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Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo

Note verbale dated 8 April 2009 from the Permanent Mission of Australia to the United Nations addressed to the Chairman of the Committee

The Permanent Mission of Australia to the United Nations presents its compliments to the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo and has the honour to refer to the provisions of Security Council resolution 1857 (2008).

The Permanent Mission of Australia has the honour to provide the Chairman with a report on the steps taken by Australia to implement paragraphs 1 to 5 of resolution 1857 (2008), pursuant to paragraph 7 of that resolution (see annex).

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Annex to the note verbale dated 8 April 2009 from the Permanent Mission of Australia to the United Nations addressed to the Chairman of the Committee

Report of Australia to the Security Council Sanctions Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo pursuant to paragraph 7 of Security Council resolution 1857 (2008)

1. In paragraph 7 of its resolution 1857 (2008), the Security Council "called upon all States to report to the Committee, within 45 days of its adoption on the actions they had taken to implement the measures imposed by paragraphs 1, 2, 3, 4 and 5 of the resolution". This report describes the steps taken and being taken by Australia to implement those paragraphs.

2. Paragraph 1 of resolution 1857 (2008) reads as follows:

> "*Decides* to renew until 30 November 2009 the measures on arms imposed by paragraph 1 of resolution 1807 (2008) and reaffirms the provisions of paragraphs 2, 3 and 5 of that resolution"

3. The Australian Government implements paragraph 1 of resolution 1857 (2008) through regulations 8, 9, 10 and 11 of the Charter of the United Nations (Sanctions — Democratic Republic of the Congo) Regulations 2008 (Democratic Republic of the Congo Regulations). Regulation 8 prohibits the direct or indirect supply, sale or transfer of arms and related materiel, without authorization, to the Democratic Republic of the Congo by a person in Australia, or by an Australian anywhere in the world, or under the use of an Australian flag aircraft or vessel.

4. Regulation 9 empowers the Minister for Foreign Affairs to authorize the supply, sale or transfer of arms or related materiel, if the goods are:

(a) Being supplied to the Government of the Democratic Republic of the Congo;

(b) Being supplied solely for the support of, or use by, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC);

(c) Non-lethal military equipment intended solely for humanitarian or protective use;

(d) Protective clothing being exported temporarily for the personal use of United Nations personnel, a representative of the media or a humanitarian or development worker or an associated person.

5. Regulation 10 prohibits the provision, without authorization, of assistance, advice or training, or financing or financial assistance related to military activities, to any person in the Democratic Republic of the Congo. Under Regulation 11, the Minister for Foreign Affairs may authorize the provision of a sanctioned service only if the service:

(a) Is being provided to the Government of the Democratic Republic of the Congo;

(b) Consists of technical training and assistance intended solely for the support of or use by MONUC;

(c) Consists of technical assistance and training related to non-lethal military equipment intended solely for humanitarian or protective use.

6. The Democratic Republic of the Congo Regulations require the Minister for Foreign Affairs to notify the Committee established by the Security Council under resolution 1533 (2004) (Committee) in advance if he intends to authorize the supply, sale or transfer of arms and related materiel (supply) or the provision of assistance, advice, training, financing or financial assistance related to military activities (service) where:

(a) The supply or service is intended for the Government of the Democratic Republic of the Congo;

(b) The supply is, or the service relates to, non-lethal military equipment intended solely for humanitarian or protective use.

The notification to the Committee must include details about the end-user, the proposed date of delivery and the itinerary of shipments.

7. Regulations 8 and 10 of the Democratic Republic of the Congo Regulations have been specified by the Minister for Foreign Affairs as United Nations sanction enforcement laws. Contravention of a United Nations sanction enforcement law or a condition of a permit granted under a United Nations sanction enforcement law (such as a permit granted under Regulation 9 or 11) is an offence under section 27 of the Charter of the United Nations Act 1945 (Act). The maximum penalties upon conviction for such an offence are, for individuals, 10 years imprisonment or a fine the greater of 2,500 penalty units or three times the value of the transaction (if this can be calculated). For bodies corporate, the offence is an offence of strict liability unless the body corporate can prove that it took reasonable precautions and exercised due diligence to avoid contravening the law. The maximum penalty for bodies corporate upon conviction is a fine the greater of 10,000 penalty units or three times the value of the transaction (if this can be calculated). A penalty unit is equivalent to 110 Australian dollars under section 4AA of the Crimes Act 1914.

8. Paragraph 2 of resolution 1857 (2008) reads as follows:

> "*Decides* to renew, for the period specified in paragraph 1 above, the measures on transport imposed by paragraphs 6 and 8 of resolution 1807 (2008) and reaffirms the provisions of paragraph 7 of that resolution"

9. Paragraph 2 is not applicable to Australia as Australia is not a country in the same region as the Democratic Republic of the Congo.

10. Paragraphs 3, 4 and 5 of resolution 1857 (2008) reads as follows:

> "*Decides* to renew, for the period specified in paragraph 1 above, the financial and travel measures imposed by paragraphs 9 and 11 of resolution 1807 (2008) and reaffirms the provisions of paragraphs 10 and 12"

> "*Decides* that the measures referred to in paragraph 3 above shall apply to the ... individuals and, as appropriate, entities, as designated by the Committee" [described in subparagraphs (a) to (g)]

"*Decides*, for a further period ending on the date referred to in paragraph 1 above, that the measures in paragraph 3 above shall continue to apply to individuals and entities already designated pursuant to paragraphs 9 and 11 of resolution 1807 (2008), paragraphs 13 and 15 of resolution 1596 (2005), paragraph 2 of resolution 1649 (2005), and paragraph 13 of resolution 1698 (2006), unless the Committee decides otherwise."

11. The financial and travel measures discussed in the following paragraphs apply to persons and entities designated by the Committee to be subject to the financial and travel measures imposed by paragraphs 9 and 11 of Security Council resolution 1807 (2008), including those referred to in paragraphs 4 and 5 of resolution 1857 (2008).

Financial measures

12. Regulation 12 of the Democratic Republic of the Congo Regulations prohibits making an asset available, directly or indirectly, to, or for the benefit of, a person or entity designated by the Security Council or by the Committee under resolution 1807 (2008), without authorization. Regulation 13 of the Democratic Republic of the Congo Regulations prohibits a person who holds an asset that is owned or controlled, directly or indirectly, by a designated person or entity from, directly or indirectly, using or dealing with that asset, without authorization. These regulations apply to the actions of all persons within Australia and to Australians anywhere in the world. "Asset" is defined broadly under the Act to include an asset of any kind or property of any kind, whether tangible or intangible, movable or immovable, however acquired, and a legal document or instrument in any form, including electronic or digital, evidencing title to, or interest in, such an asset or such property, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.

13. Regulation 14 of the Democratic Republic of the Congo Regulations provides that the Minister for Foreign Affairs may, on application, authorize the making available of an asset where that would otherwise contravene Regulation 12, or a use of, or a dealing with, an asset in circumstances that would otherwise contravene Regulation 13, where the application relates to:

(a) A basic expense dealing in accordance with subparagraph 12 (a) of resolution 1807 (2008);

(b) An extraordinary expense dealing in accordance with subparagraph 12 (b) of resolution 1807 (2008);

(c) A legally required dealing in accordance with subparagraph 12 (c) of resolution 1807 (2008).

The terms "basic expense dealing", "extraordinary expense dealing" and "legally required dealing" are defined in sub-regulations 5 (3), 5 (4) and 5 (7) of the Charter of the United Nations (Dealing with Assets) Regulations 2008.

14. Regulations 12 and 13 of the Democratic Republic of the Congo Regulations have been specified by the Minister for Foreign Affairs as United Nations sanction enforcement laws. Contravention of a United Nations sanction enforcement law, or a condition of a permit granted under a United Nations sanction enforcement law

(such as a permit granted under Regulation 14) is an offence under section 27 of the Act. The maximum penalties upon conviction for such an offence are, for individuals, 10 years imprisonment or a fine the greater of 2,500 penalty units or three times the value of the transaction (if this can be calculated). For bodies corporate, the offence is an offence of strict liability unless it can prove that it took reasonable precautions, and exercised due diligence, to avoid contravening the law. The maximum penalty for bodies corporate upon conviction is a fine the greater of 10,000 penalty units or three times the value of the transaction (if this can be calculated). A penalty unit is equivalent to 110 Australian dollars under section 4AA of the Crimes Act 1914.

Travel measures

15. Australia has a universal visa system which requires non-citizens to have a visa to permit and regulate their entry into and right to remain in Australia. In accordance with the Migration (United Nations Security Council) Regulations 2007, a person who is or becomes the subject of a resolution of the Security Council that requires Australia to prevent that person entering or transiting through Australian territory is unable to be granted a visa or, if a visa has already been granted, will have his or her visa cancelled, consistent with the obligations in the relevant Security Council resolution. The Minister for Immigration and Citizenship specifies, by legislative instrument, the relevant resolutions to be covered by the Regulations. Resolutions 1533 (2004), 1596 (2005), 1649 (2005), 1698 (2006), 1768 (2007), 1771 (2007), 1799 (2007), 1807 (2008) and 1857 (2008) have been specified in respect of the Democratic Republic of the Congo.

16. The Department of Immigration and Citizenship maintains a Movement Alert List, which includes the names of non-citizens whose eligibility for a visa grant or continuing eligibility to hold a visa may be at issue. All persons designated by the Committee as being subject to travel measures are included on the Movement Alert List. The names of all visa applicants are checked against the List prior to any decision to grant a visa to enter Australia. The List is electronically accessible to officers of the Department of Immigration and Citizenship posted to Australia's diplomatic and consular missions worldwide. A complete List update is sent electronically, at least daily, to Australia's overseas missions. Additional checks are also undertaken at Australian entry points to ensure that any person put on the List subsequent to a visa grant is identified.

17. Where there may be a potential match between a visa applicant and an individual listed on the Movement Alert List, further enquiries must be made before a visa can be granted, or, if it has already been granted, to consider whether it can or must be cancelled. Led by the Department of Immigration and Citizenship, this is a consultative process including all government bodies, which aims to resolve the MAL alert by examining available data on both applicants and individuals on the List.

18. In respect of the exceptions to the travel and transit restrictions provided under paragraph 10 of resolution 1807 (2008), the Migration (United Nations Security Council Resolutions) Regulations 2007 provide that a visa to travel to or transit through Australia will be permitted where the Minister for Immigration and Citizenship is satisfied that a committee established under a Security Council resolution has:

(a) Determined that the applicant's travel to or transit through Australia is justified;

(b) Authorized the applicant's travel to or transit through Australia.

19. Therefore, Australian law can allow the travel to or transit through Australia of designated persons if the Committee determines, on a case-by-case basis, that the:

(a) Travel is justified on humanitarian grounds;

(b) Travel would further the objectives of peace and national reconciliation in the Democratic Republic of the Congo and stability in the region;

(c) Transit concerns an individual who is returning to the territory of his or her State of nationality or participating in efforts to bring to justice perpetrators of grave violations of human rights or international humanitarian law.

20. The Migration (United Nations Security Council Resolutions) Regulations 2007 also provide that a visa can be granted to an applicant if the Minister for Immigration and Citizenship is satisfied that the grant of the visa is justified by compelling circumstances, including the fulfilment of an international obligation owed by Australia. Determination by the Committee that there are humanitarian or peace and national reconciliation or the pursuit of international justice reasons for a designated person to be granted a visa could constitute such compelling circumstances.